

E-FILED ON DECEMBER 22, 2010

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UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEVADA (LAS VEGAS)

In re:

SOUTH EDGE, LLC,

Involuntary Debtor.

Case No. 10-32968

Chapter 11

**DECLARATION OF ROBERTO J.  
KAMPFNER IN SUPPORT OF EX PARTE  
APPLICATION FOR AN ORDER  
SHORTENING TIME TO SET HEARING  
ON: MOTION (I) TO PREVENT KLEE,  
TUCHIN, BOGDANOFF & STERN LLP  
FROM REPRESENTING SOUTH EDGE,  
LLC AND (II) TO APPOINT A  
RESPONSIBLE OFFICER TO HIRE  
COUNSEL AND DETERMINE WHETHER  
THE PETITION SHOULD BE  
CONTROVERTED**

**Hearing Date**

Date: [OST REQUESTED]

Time: [OST REQUESTED]

**DECLARATION OF ROBERTO J. KAMPFNER**

I, ROBERTO J. KAMPFNER, declare as follows:

1. I am an attorney duly admitted to practice law in the State of California. My *pro hac vice* application to appear in this proceeding is pending.

2. I am a partner at White & Case, LLP, counsel for Focus South Group, LLC (“Focus”) and Holdings Manager, LLC (“Holdings Manager”).

3. Pursuant to this Court’s December 16, 2010 Scheduling Order, this Court will conduct an evidentiary hearing on Wednesday, January 19, 2011 on the Petitioners’ Motion to Appoint an Interim and Permanent Chapter 11 Trustee for South Edge, LLC. This Court will also conduct an evidentiary hearing, to begin on Monday, January 24, 2011, on the underlying involuntary petition.

4. Concurrently herewith, Focus and Holdings Manager have filed a Motion (i) to Prevent Klee, Tuchin, Bogdanoff & Stern LLP from Representing South Edge, LLC and (ii) to Appoint a Responsible Officer to Hire Counsel and Determine Whether the Petition Should Be Controverted (the “Focus Motion”), and have requested that the Focus Motion be heard on shortened time. Attached hereto as Exhibit A, pursuant to Local Rule 9006, is a true and correct copy of the Focus Motion.

5. As set forth with more particularity in the Focus Motion, Focus contends that KB Home Nevada, Inc. (“KB”), Coleman-Toll Limited Partnership, LLC (“Toll”), Pardee Homes of Nevada (“Pardee”), Beazer Homes Holding Corp. (“Beazer”), and MTH Homes Nevada, Inc. (“Meritage”) (collectively, and excluding Focus, the “Builders”) did not have the corporate authority to purportedly hire Klee, Tuchin, Bogdanoff & Stern LLP (“KTB&S”) to represent South Edge in connection with these proceedings.

6. Among other things, KTB&S’s services will cost more than \$100,000 and, therefore, the Builders do not have the supermajority (75% of the percentage interests in South Edge) required by the South Edge operating agreement to hire KTB&S. Focus also contends that the Builders cannot vote to retain counsel for South Edge in connection with the involuntary petition because these proceedings were caused by the Builders’ defaults under the South Edge

1 operating agreement, and the Builders cannot vote on matters related to their defaults. In any  
2 event, the Builders (to the extent they have authority to hire counsel, which they do not) are  
3 hopelessly conflicted and cannot adequately represent South Edge's interests in these  
4 proceedings. Accordingly, an independent and neutral responsible officer should be appointed to  
5 hire counsel for South Edge and determine whether or not controvert the petition.

6 7. Given the deadlines set forth in the Scheduling Order and South Edge's need for  
7 representation, I believe it is critical that the issues raised by the Focus Motion be resolved on  
8 shortened time. Among other things, South Edge cannot be properly represented while the  
9 authority of its legal counsel is unclear.

10 8. On Monday, December 20, 2010, and Tuesday, December 21, 2010, I  
11 communicated with Matt Heyn of KTB&S, purported counsel for South Edge, and attempted to  
12 reach an agreement with respect to when the Focus Motion should be heard and oppositions and  
13 replies should be filed. No agreement was reached.

14  
15 I declare under penalty of perjury that the foregoing is true and correct and was executed  
16 on December 22, 2010 at Los Angeles, California.

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28

Roberto J. Kampfner

# **EXHIBIT A**

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In re:  
  
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Case No. 10-32968

Chapter 11

**NOTICE OF MOTION AND MOTION (I)  
TO PREVENT KLEE, TUCHIN,  
BOGDANOFF & STERN LLP FROM  
REPRESENTING SOUTH EDGE, LLC AND  
(II) TO APPOINT A RESPONSIBLE  
OFFICER FOR THE LIMITED PURPOSE  
OF HIRING COUNSEL AND  
DETERMINING WHETHER THE  
PETITION SHOULD BE  
CONTROVERTED; MEMORANDUM OF  
POINTS AND AUTHORITIES**

**Hearing Date**

Date: [OST Requested]  
Time: [OST Requested]

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1 Focus South Group, LLC (“Focus”), a member of South Edge, LLC (“South Edge” or the  
2 “Debtor”) and Holdings Manager, LLC (“Holdings Manager”), the general manager of the  
3 Debtor, submit this Motion (i) to Prevent Klee, Tuchin, Bogdanoff & Stern LLP from  
4 Representing South Edge, LLC and (ii) to Appoint a Responsible Officer for the Limited Purpose  
5 of Hiring Counsel and Determining Whether the Petition Should Be Controverted.

6  
7 **I.**

8 **PRELIMINARY STATEMENT**

9 Focus is one of Southern Nevada’s most prominent developers. It has developed some of  
10 the most successful master planned communities in the state and has a substantial stake in the  
11 success of Southern Nevada. Focus is also a member of the Debtor. Affiliates of Focus serve as  
12 the General Manager of the Debtor and the construction manager of the Inspirada project. In  
13 addition, Focus is the only member to have taken down all of its land and fully pre-funded its pro  
14 rata share of major infrastructure costs. It has invested approximately \$172 million into South  
15 Edge, the second most funds of any member, and just slightly less than KB Home Nevada, Inc.,  
16 which is obligated for 48.5% of the project.

17 It is undisputed that the other members of South Edge, referenced below as the  
18 “Builders,” have not made all of their takedowns when due. Nor have they fully funded their  
19 share of development costs. Instead, as found by an arbitration panel made up of three prominent  
20 retired judges appointed by the Honorable Philip Pro — Justices A. William Maupin and Robert  
21 R. Rose, and Judge David W. Hagen, the Builders have failed to live up to their financial  
22 commitments to South Edge and have damaged Focus and South Edge in the process.  
23 Nevertheless, the Builders have and will likely continue to cast aspersions on Focus in this  
24 proceeding, claiming that Focus is acting for, or at the behest, of the Petitioners. Not true. Since  
25 the Builders first defaulted on their obligations to South Edge in early 2008, Focus has  
26 continuously fought for one goal — to force the Builders to live up to their contractual  
27 commitments to both Focus and South Edge and build Inspirada for the benefit of all parties’  
28 interests. The Builders have no such intentions, acting only in their own self-interest. This point



has been proven yet again as the Builders have purported to retain counsel for South Edge to do their bidding, without complying with the requirements of the South Edge Operating Agreement, and with the sole intention of continuing to avoid their obligations to South Edge, as opposed to acting in South Edge's best interests. This Motion is being filed to assure that South Edge retains independent counsel and that its interests, not the interests of the Builders, are properly represented in these proceedings.

## II.

### SUMMARY

In 2004, Focus, along with KB Home Nevada, Inc. ("KB"), Coleman-Toll Limited Partnership, LLC ("Toll"), Pardee Homes of Nevada ("Pardee"), Beazer Homes Holding Corp. ("Beazer"), and MTH Homes Nevada, Inc. ("Meritage") (collectively, and excluding Focus, the "Builders"), and two companies that have filed chapter 11 proceedings, Kimball Hill Homes Nev., Inc. ("Kimball Hill") and Alameda Investments, LLC ("Woodside"), formed South Edge, a limited liability company, for the purpose of purchasing approximately 1,940 acres of real property (the "Property") in Henderson, Nevada. Later, the members of South Edge (collectively, the "Members" and each a Member") agreed that, through South Edge, they would also develop a project (the "Project") on the Property to be known as "Inspirada." On or about May 3, 2004, the Members entered into the Amended and Restated Operating Agreement of South Edge, LLC (as amended by the First Amendment thereto as of October 29, 2004, and the Second Amendment thereto as of March 8, 2007, the "Operating Agreement"), and various other related agreements, including certain "Acquisition Agreements," requiring Members to "take down" or purchase land from South Edge.

After Focus fully performed its obligations in October 2007 and made approximately \$122 million in payments to South Edge, beginning in February 2008, the Builders began defaulting on their obligations under the various agreements governing South Edge. Among other things, the Builders failed to fully fund their pro rata share of South Edge's obligations to its lenders, failed to make their "takedowns," when due (takedowns are the primary mechanism for funding repayments of loans to South Edge's lenders), and halted work on the development of

1 Inspirada. As explained in more detail below, an arbitration panel found that each of these  
 2 actions constituted a default under the Operating Agreement. Due to these failures, the Builders  
 3 owe hundreds of millions of dollars to South Edge.

4 As a consequence of these breaches, Focus, in compliance with the Operating Agreement,  
 5 served the Builders with a demand for arbitration. Although the Operating Agreement requires  
 6 disputes to be resolved on an expedited basis, the road to arbitration was long and hard. The  
 7 Builders refused to arbitrate and attempted to prevent Focus from exercising its rights under the  
 8 Operating Agreement. They failed, and the United States District Court for the District of  
 9 Nevada (the “District Court”) ordered arbitration on July 15, 2009. After extensive discovery and  
 10 the completion of a two-week arbitration hearing, the arbitral panel (the “Panel”) issued its award  
 11 (the “Award”), which granted Focus \$36,815,354 in damages as compensation for the Builders’  
 12 failure to meet their obligations under the Operating Agreement, including as a result of their  
 13 failure to fund their pro rata shares of amounts due from South Edge to the lenders and make their  
 14 take downs when due, and refusal to continue to build the Inspirada project. True to form, the  
 15 Builders filed a flurry of motions to reduce and/or vacate the Award, none of which was  
 16 successful. The District Court confirmed the Award on November 2, 2010 and entered judgment.  
 17 The Builders have appealed.

18 On December 9, 2010, certain lenders to South Edge filed an involuntary chapter 11  
 19 petition (the “Petition”) against South Edge pursuant to section 303 (“Section 303”) of title 11 of  
 20 the United States Code (the “Bankruptcy Code”) in this Court.

21 The Builders have now purported to cause South Edge to retain the services of Klee,  
 22 Tuchin, Bogdanoff & Stern LLP (“KTBS”) to represent South Edge with respect to this  
 23 proceeding. The Builders’ engagement of KTBS is impermissible and is the latest in a long line  
 24 of maneuvers employed by the Builders to avoid their contractual obligations to South Edge.<sup>1</sup> As

25 <sup>1</sup> The Builders’ abuse of their purported “majority” on the Management Committee has already begun. Despite the  
 26 fact that Holdings Manager continues to serve as the General Manager of South Edge, and that Focus is the only  
 27 Member of South Edge to make all of its takedowns and fully fund its development obligations to South Edge,  
 28 KTBS has served numerous burdensome subpoenas on Holdings Manager and Focus and has sought extensive  
 depositions during the week between Christmas and New Year’s Day, which were scheduled without any  
 consultation with Focus of Holdings Manager. Conversely, KTBS, South Edge’s purported counsel has not  
 noticed any depositions of the Builders, which jointly owe hundreds of millions of dollars to South Edge. Focus and

1 an initial matter, the Operating Agreement requires a 75% “supermajority” vote before South  
2 Edge can enter into a contract that obligates it to payments of more than \$100,000. Without  
3 Focus’s participation in the vote, such supermajority was not and cannot be reached. The  
4 Builders have attempted to circumvent the “supermajority” requirement by agreeing to pay  
5 KTB&S’s legal fees directly themselves and without obligating South Edge to do so. This is  
6 simply form over substance. Indeed, the purported resolution hiring KTB&S expressly states that  
7 all payments made by the Builders to KTB&S will be counted as capital contributions to South  
8 Edge. Further, any firm being compensated directly by the Builders, and not South Edge, will  
9 have, at best, two masters and be hopelessly conflicted. Importantly, the resolution purporting to  
10 authorize South Edge to employ KTB&S does not require KTB&S to independently assess the  
11 facts or the law and act in the best interests of South Edge; rather, it requires KTB&S to oppose  
12 the Petition and the trustee motions filed by the Petitioners without regard to the facts or the law.  
13 The Builders are attempting to hire KTB&S to do their bidding, not act in the best interests of  
14 South Edge, and protect the Builders from having to pay the hundreds of millions of dollars the  
15 Builders owe South Edge. As such, KTB&S should not have been engaged, and has no right or  
16 authority to represent South Edge.

17 Further, the Award makes clear that the Operating Agreement strips members of South  
18 Edge of the right to vote on matters related to their own defaults. Here, these proceedings are the  
19 direct result of the Builders’ unwillingness to perform their obligations under the Operating  
20 Agreement, and determining who South Edge should hire as counsel and on what terms are both  
21 matters related to the Builders’ defaults upon which the Builders have no right to vote.

22 The Operating Agreement also makes clear that South Edge cannot institute legal  
23 proceedings related to the failure of a Member to make a capital contribution without the  
24 affirmative vote of 75% of the Management Committee, not including non-contributing  
25 Members. As determined by the Panel, the Builders are clearly non-contributing Members.  
26 Finally, the Operating Agreement expressly authorizes Holdings Manager, as the General

27  
28 Holdings Manager will file a motion to quash those subpoenas, but it is already quite clear that KTB&S represents  
the interests of the Builders, not the interests of South Edge.

1 Manager of South Edge, subject to the direction of the Management Committee, to hire counsel  
2 for South Edge and to defend, compromise and settle litigation. The Builders completely ignored  
3 these provisions and hired KTB&S without consulting or including Holdings Manager or Focus  
4 in any manner whatsoever.

5 In addition to determining that the Builders cannot hire counsel on behalf of South Edge,  
6 the Court should exercise its authority under section 105(a) and 303(f) of the Bankruptcy Code to  
7 appoint a “responsible officer” for the purpose of (i) selecting counsel to represent South Edge;  
8 and (ii) determining whether or not the Petition should be controverted. The Court’s appointment  
9 of a responsible officer will guarantee that South Edge’s interests (not the interests of the  
10 Builders) are properly represented throughout these proceedings.

11 The Court can and should appoint such an officer. The Builders and Focus do not agree  
12 on the question of who has authority to hire and direct South Edge counsel. Nor do they agree on  
13 the instructions that should be given to South Edge’s counsel. Further, even if the Builders could  
14 unilaterally hire and direct counsel (which they cannot do), they simply have too many conflicts  
15 to defend the interests of South Edge, as opposed to their own. The Builders (as the Panel found)  
16 breached their contractual duties under the Operating Agreement by stopping the development of  
17 the Project, failing fund their share of the financing payments owed by South Edge to its lenders,  
18 and failing to make their takedowns when due. If and when relief is entered, South Edge will  
19 have the tools with which to pursue such claims on its own behalf, should it choose to do so.  
20 And, if this proceeding is not dismissed within 60 days, the Builders will owe direct obligations  
21 to repay the loans made by JPMorgan and the other lenders. Thus, the Builders have every  
22 incentive to controvert the Petition, whether or not doing so is in the best interests of South Edge.  
23 Under these circumstances, the appointment of a neutral third party to hire and direct counsel is  
24 essential and critical, and sidesteps any disagreements concerning corporate governance. Focus  
25 and South Edge’s general manager, Holdings Manager, respectfully request that the Motion be  
26 granted.

1 **III.**

2 **STATEMENT OF FACTS**

3 **A. Formation of Inspirada**

4 South Edge was created for the purpose of acquiring and then later developing the  
5 Property for a project known as “Inspirada.” The Inspirada development is essentially a small  
6 city, comprised of seven residential villages of approximately 200 acres each, and an almost 400-  
7 acre Town Center. The total projected cost of the master planned development, including land  
8 acquisition, development and financing costs, is approximately \$1.2 billion.

9 On or about May 3, 2004, the Members entered into the Operating Agreement, and  
10 various other related agreements, including the Acquisition Agreements, which require Members  
11 to “take down” or purchase land from South Edge. The funds generated by the takedowns are  
12 used to pay the loans made by the Petitioners and the other lenders to South Edge. Pursuant to  
13 the Operating Agreement, Holdings Manager was designated “General Manager” of South Edge  
14 and charged with running its day-to-day operations. *See* Declaration of Thomas J. DeVore  
15 (“DeVore Decl.”), Ex. A (Operating Agreement), p. 1, and §§ 5.7, 5.8. South Edge and the  
16 Members also entered into various “Loan Documents” with a syndicate of lenders for which  
17 JPMorgan Chase, N.A. (“JPMorgan”) serves as agent. The Property was auctioned by the Bureau  
18 of Land Management in May of 2004. South Edge was the prevailing bidder at the auction and  
19 closed the sale of the Property on November 1, 2004.

20 **B. The Operating Agreement**

21 The Members subsequently amended the Operating Agreement on two separate occasions.  
22 On or about October 29, 2004, the Members entered into the First Amendment to Amended and  
23 Restated Operating Agreement (the “First Amendment”) as a requirement for obtaining financing.  
24 The First Amendment added various provisions to the Operating Agreement, which make it clear  
25 that the Members are required to contribute capital as necessary for South Edge to meet its  
26 obligations to its lenders. *DeVore Decl.*, Ex. B (First Amendment). Among other things, the  
27 First Amendment added Section 11.1.12 to the Operating Agreement, which, as discussed more  
28 fully below, makes it an “Event of Default” under the Operating Agreement for a Member to act

or fail to act in any manner that causes South Edge to be in default under any of its loan documents with its lenders (subject to any applicable cure periods). *Id.* The Members also entered into a Second Amendment to the Amended and Restated Operating Agreement on or about March 8, 2007. *See* DeVore Decl., Ex. C (Second Amendment).

Generally, pursuant to the Operating Agreement, the Members agreed to: (a) make a joint bid for the Property; (b) upon a successful bid, to (i) formulate a conceptual plan for the development of the Property, (ii) obtain necessary approvals and authorizations for the subdivision of the Property into “Pods,” (iii) design and install certain infrastructure improvements, (iv) allocate and convey the Property to the Members in proportion to their respective percentage interests in South Edge, and (v) obligate each Member to purchase or “take down” its Pods from South Edge pursuant to a pre-determined schedule; (c) provide a mechanism for sharing the costs of developing Inspirada among the Members; and (d) prepare and record appropriate design and architectural guidelines and CC&R documents to govern the Inspirada development. DeVore Decl., Ex. A (Operating Agreement). Section 5.1.1 of the Operating Agreement also establishes a “Management Committee,” which is comprised of a representative of each Member voting by “Percentage Interest.” *Id.*

The Ownership Interests of the Members of South Edge are as follows:

Member	Percentage Interest	Acreage	Units in Inspirada
Focus	15.59%	304.52 Acres	15.59 Units
Meritage	3.53%	68.96 Acres	3.53 Units
Toll	10.52%	205.49 Acres	10.52 Units
Beazer	2.58%	50.40 Acres	2.58 Units
KB	48.45%	946.38 Acres	48.45 Units
Pardee	4.90%	95.71 Acres	4.90 Units
Woodside (now bankrupt)	8.14%	159.00 Acres	8.14 Units
Kimball Hill (now bankrupt)	6.29%	122.86 Acres	6.29 Units
	100.00%	1,953.32 Acres	100.00 units

1 The Management Committee generally governs the affairs of South Edge. The Operating  
 2 Agreement requires attendance by Managers representing at least three Members that hold at least  
 3 60% of the Percentage Interests to constitute a quorum. DeVore Decl., Ex. A (Operating  
 4 Agreement), § 5.2.4. Importantly, the Operating Agreement also states that the “General  
 5 Manager shall attend the meetings of the Management Committee . . . .” *Id.* at § 5.7. The  
 6 Management Committee must act by the affirmative vote of the Managers representing a majority  
 7 of the Percentage Interests. *Id.* at § 5.1.1. However, certain circumstances require affirmative  
 8 action by a “supermajority,” which requires a vote by Members representing 75% of the  
 9 Percentage Interests. Of particular relevance here, an affirmative vote by a supermajority is  
 10 required to approve “all contracts which obligate [South Edge] to payments of \$100,000 or more  
 11 in the aggregate” and for “the initiation of legal proceedings” related to unpaid capital  
 12 contributions to South Edge. *Id.* at §§ 5.1.2(j), 2.4.3.2.

13 The Operating Agreement also spells out the specific powers and duties of the General  
 14 Manager, which include:

15 Subject to the directions and determinations of the Management Committee,  
 16 institute, prosecute, defend, settle, compromise, and dismiss lawsuits or other  
 17 judicial or administrative proceedings brought by, on behalf of, or against the  
 Company.

18 \* \* \* \*

19 Assist the Management Committee in the selection and engagement of  
 20 independent contractors, such as ... lawyers ... and supervise the activities of  
 such contractors.

21 *Id.* at §§ 5.8.1(j), (n).

## 22 **C. The Financing Arrangements**

23 In order to finance part of the purchase and development of the Property, South Edge  
 24 obtained loans (the “Loans”) in the amount of \$535 million from a syndicate of lenders (the  
 25 “Lenders”) for which JPMorgan acts as administrative agent (the “Administrative Agent”). The  
 26 Loans were obtained under the terms of a Credit Agreement (the “Original Credit Agreement”) dated November 1, 2004, and certain other loan documents, which include conditional repayment  
 27 guaranties (the “Repayment Guaranties”) by each Member and its respective parent.  
 28



1 Subsequently, South Edge entered into an Amended and Restated Credit Agreement dated as of  
 2 March 9, 2007, increasing the principal amount of the Loans to \$585 million (the “Amended and  
 3 Restated Credit Agreement” and, together with the Original Credit Agreement, the “Credit  
 4 Agreement”). See Decl. of John P. McDonagh In Support of JPMorgan’s Motion to Appoint an  
 5 Interim and Permanent Chapter 11 Trustee for South Edge, LLC During (i) the “Gap” Period and  
 6 (ii) On a Permanent Basis (“McDonagh Decl.”), Ex. A (Credit Agreement).

7 South Edge, not its Members, is the borrower under the Credit Agreement. As a result,  
 8 the Operating Agreement contains various provisions that obligate the Members to contribute the  
 9 capital required for South Edge to satisfy its obligations to the Lenders under the Credit  
 10 Agreement and makes it an Event of Default for a member not to do so. Most importantly,  
 11 Section 11.1.12 of the Operating Agreement makes it an Event of Default for a Member to breach  
 12 its Acquisition Agreement (e.g., by not making its takedowns) or cause South Edge to default  
 13 under its obligations to the Lenders under the Credit Agreement and the other loan documents.<sup>2</sup>  
 14 In addition, Section 2.3.2 of the Operating Agreement requires the Members to make capital  
 15 contributions to South Edge as necessary for South Edge to hold at all times a three-month  
 16 interest reserve; Section 2.3.3 expressly provides that each Member “shall pay to the Company”  
 17 its share of all amounts due under Credit Agreement, including principal, fees and interest; and  
 18 Section 6.11.5 of the Operating Agreement requires Members to comply with their respective  
 19 takedown schedules. DeVore Decl., Ex. A (Operating Agreement). After extensive litigation, the  
 20 Panel found that the Builders violated these provisions of the Operating Agreement by (much as  
 21

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22 <sup>2</sup> Section 11.1.12 provides, in relevant part:

23  
 24 For purposes of this Agreement, an “Event of Default” shall mean any of the  
 following:

25 11.1.12 Default under the Loan Documents or Acquisition Agreement. A  
 26 default by such Defaulting Party under its respective Acquisition Agreement or  
 27 an act or omission which causes the Company to be in default under any Loan  
 Documents, and the failure to cure such default within the applicable cure period,  
 28 if any, under either the Acquisition Agreement or the Loan Documents,  
 respectively.



1 they attempt to do here) improperly using the Management Committee to extend takedown dates  
2 and failing to contribute capital as required by the Operating Agreement.

3 Under the terms of the Repayment Guaranties, the occurrence of a “Bankruptcy Event,”  
4 defined to include an involuntary petition filed against South Edge that is “undismissed for 60  
5 days,” triggers an automatic “springing guaranty” under which each Builder owes a liquidated  
6 sum to the Lenders. *See, e.g., McDonagh Decl., ¶ 20.*

7  
8 **D. The Builders’ Defaults Forced Focus to Demand Arbitration**

9 After Focus fully performed its obligations in October 2007, beginning in February 2008,  
10 the Builders began defaulting on their obligations under the Operating Agreement, the  
11 Acquisition Agreements and other related documents, which, in turn, caused South Edge to  
12 default under the terms of its loan documents with the Lenders. Among other things, the Builders  
13 failed to (a) continue development of the Project, (b) make the capital contributions required for  
14 South Edge to make interest payments to its lenders and fund a three-month interest reserve, and  
15 (c) make takedowns scheduled from April 15, 2008, through today.

16 Notably, at the time that the Builders began causing defaults under the Credit Agreement,  
17 the General Manager recommended to the Management Committee that South Edge retain  
18 independent counsel. The General Manager renewed such recommendation on several occasions.  
19 *See DeVore Decl., ¶ 10.* The Builders refused to hire counsel until the Petition was filed.

20 Instead of either complying with their obligations or, at a minimum, obtaining counsel to  
21 advise South Edge as to its rights and obligations, the Builders attempted, from time to time, in an  
22 attempt to excuse their defaults, to extend their takedown dates by purportedly amending the  
23 takedown schedule attached to their respective Acquisition Agreements through actions by  
24 written consent of the Members or votes. Focus objected to each of these resolutions. The Panel  
25 found that those actions were ineffective and constituted defaults under Section 11.1.12 of the  
26 Operating Agreement. *DeVore Decl., Ex D (Award), p. 58.*

27 Faced with the Builders’ intransigence and failure to honor their respective obligations to  
28 South Edge and Focus, Focus commenced an arbitration proceeding on behalf of itself and South

Edge seeking specific performance of the Builders' obligations under the Operating Agreement or, in the alternative, damages. The Builders contested Focus's right to any form of arbitration. The District Court, however, ordered the parties to arbitration on July 15, 2009. The arbitration involved significant discovery, numerous motions for summary disposition, all of which were denied, and a lengthy evidentiary hearing that lasted approximately two weeks. At the conclusion of the process, the Panel issued a 75-page award.

#### **E. The Award**

The Award granted Focus \$36,815,354 in direct damages on account of the Builders' numerous breaches of the Operating Agreement. Among other things, the Panel found:

[The Builders], except Meritage, breached the Operating Agreement in connection with their duties to fund financing interest and interest reserves when the Members, voting their interests as Managers of South Edge, either refused to propose or approve capital calls for such expenditures. Meritage breached these duties under the Operating Agreement by failure to seek tender of financing interest and interest reserves into the appropriate account.

DeVore Decl., Ex. D. (Award), p. 57. The Panel also found:

Likewise, [the Builders], except Meritage, breached their obligations under the Operating Agreement to effect their April 2008 Takedowns as scheduled, or during and following expiration of the Forbearance Agreement on June 31, 2008, by unilaterally extending Takedown dates without the approval of . . . JPMorgan. . . The [Builders] also breached Section 7.03(o) of the Credit Agreement, which prohibits cessation of construction of improvements for a continuous period. Such in turn constituted an "Event of Default" under [Operating] Agreement Section 11.1.12. This breach became effective upon the Management Committee vote to terminate work taken on March 10, 2008.

*Id.* at 58. In sum, the "[Builders] breached the agreement when they voted to stop build out of the project, failed to fund interest reserves and land financing interest payments, failed to perform on the Takedowns and unilaterally extended takedowns." *Id.* at 56.

The Panel also went to great lengths to analyze the ability of the Members to participate in Management Committee votes relating to South Edge, particularly in a situation where a Member has committed an Event of Default under the Operating Agreement. The Panel determined that

1 Section 11.2 “immediately divest[s] defaulting [M]embers on a limited basis of their rights to  
2 vote on matters relating to their Events of Default.” *Id.* at 46-47. The Panel concluded:

3 “[N]o Member of South Edge entirely loses the right to vote on  
4 Company business upon an Event of Default until and unless that  
5 Member has been voted out of the company in compliance with the  
6 [Operating Agreement]; and the provisions of Section 11.2 relating  
7 to the constitution of a quorum only apply with respect to gathering  
8 a vote on **the matters related to the particular Event of Default.**  
9 Thus, votes by defaulting [M]embers to extend takedowns  
10 constitute breaches of the Operating Agreement along with . . . the  
11 unilateral extensions of and failures to consummate the takedowns.”

12 *Id.* at 47 (emphasis added).

13 Under the terms of Focus’s Acquisition Agreement, Focus was required to take down all  
14 of its Pods and fund its M.I. Deposit on October 15, 2007. The Panel found that Focus took down  
15 all of its land on October 25, 2007, and deposited approximately \$30.7 million as an M.I. Deposit.  
16 *Id.* at 20. The total cost to Focus to do so was approximately \$122 million. *Id.* By doing so, and  
17 by paying in other capital of almost \$50 million, Focus fully complied with all of its obligations  
18 under the Operating Agreement and the Acquisition Agreement to fully fund South Edge and the  
19 development of the Project.<sup>3</sup> See DeVore Decl., Ex. D (Award), p. 20.

20 The District Court entered an order confirming the Award on November 2, 2010, and  
21 entered judgment for Focus in the amount of \$36,815,354, plus post-judgment interest.

22 While the Panel ruled that the Builders had breached the Operating Agreement, it did not  
23 require that the Builders specifically perform their obligations to South Edge, as requested by  
24 Focus. The Panel did not reach the question of whether specific performance was precluded by  
25 the Operating Agreement and/or Acquisition Agreements with respect to Focus, finding instead  
26 that it would not use its discretion to order such relief under the particular circumstances of the  
27 case and in light of its damage award to Focus. *Id.* at 55-56.

28 Further, the Panel found that Focus did not have standing to enforce *South Edge’s* rights  
under the Operating Agreement against the Builders. Focus only had standing to enforce its own  
rights. *Id.* at 48. As explained below, this decision has created an insurmountable conflict for the

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<sup>3</sup> Importantly, Focus’s repayment guaranties were released by the Lenders when Focus made all of its takedowns in October 2007. DeVore Decl., ¶ 7.

1 Builders in connection with this proceeding. In short, a bankruptcy proceeding could provide  
 2 South Edge with the ability to collect its sizable claims against the Builders, and the Builders  
 3 have every incentive to prevent this from happening regardless of what is best for South Edge or  
 4 the Project.

5  
 6 **F. The Petition**

7 On December 9, 2010, JPMorgan, in its capacity as Lender to South Edge, together with  
 8 Credit Agricole Corporate and Investment Bank and Wells Fargo Bank, N.A. (collectively, the  
 9 “Petitioners”), filed the Petition.

10 On December 16, 2010, KTB&S filed its Notice of Appearance and Request for Papers  
 11 (the “Notice of Appearance”). The Notice of Appearance alleges that South Edge will appear in  
 12 this proceeding by and through KTB&S. Neither Focus nor Holdings Manager was consulted  
 13 with respect to the retention of KTB&S. DeVore Decl., ¶ 8. In addition, the General Manager  
 14 was not advised of any meetings relating to the retention of KTB&S, did not negotiate the terms  
 15 of the engagement, and is being prohibited from fulfilling its function of supervising such  
 16 counsel.

17 On December 16, 2010, the Builders circulated a so-called “Action by Written Consent of  
 18 the Management Committee of South Edge, LLC” (the “Action”). DeVore Decl., Ex. E. The  
 19 Action claims that “by this Written Consent, the Management Committee determines that [South  
 20 Edge] should engage [KTBS&S] to oppose the Involuntary Petition, seek dismissal of and/or  
 21 abstention with respect to the Involuntary Bankruptcy Case, oppose the appointment of an interim  
 22 trustee pending adjudication of the Involuntary Petition, and address any related disputes  
 23 [regarding] the Involuntary Petition.” *Id.* at 1. The Action purports to proceed without Focus’s  
 24 participation because “[Focus] and [Holdings Manager] are cooperating with [the Petitioners] and  
 25 are adverse to [South Edge] in respect of the Involuntary Petition.”<sup>4</sup> *Id.* at 2. Further, in an  
 26 attempt to circumvent the Operating Agreement’s requirement of a supermajority for such a

27 <sup>4</sup> Focus is in no way adverse to South Edge in these proceedings and the fact that Focus may not agree with the  
 28 Builders does not make it so. Indeed, it is the Builders that are adverse to South Edge and are attempting to insulate  
 themselves from their defaults under the Operating Agreement.

1 decision, the Action states that “[a]ny engagement agreement between [South Edge] and  
 2 [KTB&S] shall provide that the [Builders] are liable for the attorneys’ fees, costs and expenses  
 3 charged by [KTB&S] and shall not obligate [South Edge] for such liabilities,” but, importantly,  
 4 the Action also states that “payments to [KTB&S] shall constitute capital contributions to [South  
 5 Edge] by the [Builders].” *Id.* at 3. The Action was signed by all the Builders. *Id.* at 4-8.

#### 6 IV.

#### 7 ARGUMENT

#### 8 A. KTB&S Cannot Represent South Edge Because the Builders’ Vote to Retain 9 KTB&S is Null and Void

10 The Builders have no authority to retain KTB&S. The Operating Agreement requires that  
 11 contracts which will “obligate [South Edge] to payments of \$100,000 or more in the aggregate”  
 12 be approved by a supermajority of managers on the Management Committee. DeVore Decl., Ex.  
 13 A (Operating Agreement), § 5.1.2. There is little doubt that KTB&S will incur fees in excess of  
 14 the \$100,000 threshold. Nevertheless, Focus was not invited to and did not participate in or  
 15 consent to the retention of KTB&S. Without Focus’s consent, the remaining Builders constitute  
 16 only a 69.98% interest in South Edge and have no authority to retain KTB&S.<sup>5</sup> Further, in spite  
 17 of the baseless allegations in the Action, Focus is not in default under the Operating Agreement,  
 18 and, as the Panel found, in any event, has the continued right to vote “until and unless [it] has  
 19 been voted out of the company in compliance with the [Operating Agreement].” DeVore Decl.,  
 20 Ex. D (Award), p. 47. That is especially true in a case such as this where the Petition is not and  
 21 cannot be related to Focus’s actions or purported defaults. Indeed, Focus is the sole Member that  
 22 has made all its takedowns and fully funded its development obligations to South Edge.

23 <sup>5</sup> Although Kimball Hill and Woodside defaulted under the terms of the Operating Agreement by filing chapter 11  
 24 petitions, the Panel expressly ruled that a Member does not lose the right to vote on matters not related to their  
 25 defaults until it is removed as a Member of South Edge pursuant to the terms of the Operating Agreement. That has  
 26 never occurred with respect to Kimball Hill or Woodside. Moreover, the Builders do not own or hold Kimball Hill or  
 27 Woodside’s interests in South Edge. As a result, the Builders only hold 69.98% of the Percentage Interests in South  
 28 Edge and cannot retain counsel without the consent of Focus in situations where counsel will bill more than  
 \$100,000. Finally, although the Builders are sure to argue that Kimball Hill and Woodside are not entitled to vote  
 because they each rejected the Operating Agreement, such argument is without merit. Indeed, it is axiomatic that  
 “[a]lthough rejection also serves to relieve a debtor from certain financial obligations, the breach created by rejection  
 under the Bankruptcy Code does not terminate rights and obligations under the contract.” *In re Ortiz*, 400 B.R. 755,  
 765 (Bankr. C.D. Cal. 2009).

1 The Builders will argue that they are entitled to circumvent the supermajority requirement  
 2 set forth in the Operating Agreement because it is they and not South Edge that will be liable for  
 3 KTB&S's legal fees. The Court should reject this argument, as it is nothing but form over  
 4 substance and is otherwise improper. DeVore Decl., Ex. E (Action), p. 3. This Court is a court  
 5 of equity and indisputably "possesses the power to delve behind the form of transactions and  
 6 relationships to determine the substance." *In re United Energy Corp.*, 944 F.2d 589, 596 (9th Cir.  
 7 1991) (citations omitted). Here, KTB&S is purportedly being hired to represent South Edge, not  
 8 the Builders, and all payments of KTB&S's fees made by the Builders purportedly will be  
 9 counted as capital contributions by the Builders to South Edge. DeVore Decl., Ex. E (Action). In  
 10 short, there is absolutely no legitimate reason that South Edge should not be liable for KTB&S's  
 11 fees and the only conceivable explanation for this strange structure is to disenfranchise Focus and  
 12 permit the Builders to manipulate South Edge's defense for their own ends. Unfortunately, the  
 13 Builders have done this before. Throughout 2008 and 2009, they purported to extend their  
 14 takedown dates to the detriment of Focus, although the Panel found that such actions were clearly  
 15 not permitted by the Operating Agreement and other South Edge documents. This Court should  
 16 similarly reject the Builders' ploy.

17 In any event, the mere fact that the Builders will be exclusively responsible for satisfying  
 18 KTB&S fee's severely compromises KTB&S's ability to represent South Edge and demonstrates  
 19 that the Builders do not seek counsel to represent the interests of South Edge; rather, they seek  
 20 counsel to represent their own interests. As noted by the court in *In re Hathaway Ranch*  
 21 *Partnership*, 116 B.R. 208, 219 (Bankr. C.D. Cal. 1990):

22 Third parties do not transfer property or funds to an attorney to represent a debtor  
 23 in possession unless that representation is in the best interest of the third party. . .  
 24 Thus by accepting payment from a third party, the proposed counsel for the debtor  
 in possession necessarily has a conflict of interest in that counsel is serving two  
 masters -- the one who paid counsel and the one counsel is paid to represent.

25 While South Edge is not a debtor-in-possession, the concept remains the same. KTB&S cannot  
 26 serve two masters, especially in a case such as this where South Edge has been alleged to be  
 27 insolvent and may have substantial and significant claims against the Builders. Indeed, the  
 28 Builders can simply refuse to pay for KTB&S's services if KTB&S does not toe the Builders'

1 line, no matter what is best for South Edge. *See e.g., In re Bergdog Prods. of Hawaii, Inc.*, 7 B.R.  
2 890, 891 (Bankr. D. Haw. 1980) (conflict of interest exists where debtor's attorney receives  
3 payment from debtor's stockholders); *In re Hathaway Ranch P'ship*, 116 B.R. at 219.

4 Not surprisingly, these conflicts have already presented themselves. Among other things,  
5 the Action does not instruct KTB&S to investigate South Edge's legal rights and duties with  
6 respect to the Petition and trustee motions; rather, it instructs KTB&S to oppose the Petition and  
7 trustee motions no matter what may ultimately be best for South Edge. Further, South Edge  
8 appears to have valuable claims against the Builders that likely can only be pursued in a  
9 bankruptcy proceeding; however, KTB&S has not noticed a single deposition of the Builders or  
10 taken any actions to investigate those claims or determine how they affect South Edge's position  
11 in these proceedings.<sup>6</sup>

12 Moreover, the Panel expressly found that a defaulting Member cannot vote with respect to  
13 matters related to its own defaults. Here, these proceedings are unquestionably related to the  
14 Builders' own defaults. As the Panel noted, the "[Builders] breached the agreement when they  
15 voted to stop build out of the project, failed to fund interest reserves and land financing interest  
16 payments, failed to perform on the Takedowns and unilaterally extended takedowns." DeVore  
17 Decl., Ex. D (Award), p. 56. It should be undisputed that South Edge cannot satisfy its  
18 obligations to the Petitioners as a result of these very same defaults. In short, the Builders cannot  
19 default under the Operating Agreement, and then vote to deprive South Edge of any effective  
20 remedy by hiring friendly and conflicted counsel and directing it to defend their interests, rather  
21 than the interests of South Edge.

22 Finally, the Operating Agreement provides that South Edge may only pursue legal  
23 proceedings resulting from a Member's failure to make capital contributions upon a  
24 supermajority vote of contributing Members. DeVore Decl., Exs. A (Operating Agreement), §  
25 2.4.3.2, and D (Award), pp. 46-47. The Builders are not contributing Members and cannot dictate  
26 the actions of South Edge.

27 \_\_\_\_\_  
28 <sup>6</sup> Conversely, KTB&S served Focus and Holdings Mangers with numerous duplicative and burdensome subpoenas without any effort to meet and confer.



1 For the reasons set forth above, the Court should find that the Builders have improperly  
2 and impermissibly retained counsel.

3  
4 **B. The Court Should Exercise Its Authority to Appoint a Responsible Officer to Hire**  
5 **Counsel and Determine Whether the Petition Should Be Controverted**

6 The Bankruptcy Code authorizes this Court to “issue any order, process, or judgment that  
7 is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a). Further,  
8 the Bankruptcy Code provides that, after an involuntary petition is filed:

9  
10 Notwithstanding section 363 of this title, except to the extent that  
11 the court orders otherwise, and until an order for relief in the case,  
12 any business of the debtor may continue to operate, and the debtor  
may continue to use, acquire or dispose of property as if an  
involuntary case concerning the debtor had not been commenced.

13 *Id.* at § 303(f) (emphasis added). And, “the case law demonstrates that the [bankruptcy] court  
14 has considerable authority to interfere with the management of a debtor corporation in order to  
15 protect the creditors’ interests.” *Matter of Gaslight Club, Inc.*, 782 F.2d 767, 770 (7th Cir. 1986)  
16 (affirming court’s replacement of debtor in possession’s president and majority shareholder per  
17 creditors’ committee’s request). *See also In re Property Co. of Am. Joint Venture*, 110 B.R. 244,  
18 246 (Bankr. N.D. Tex. 1990) (discussing court appointment of “disinterested business consultant  
19 whose purpose was to focus the [joint venture debtor’s] energies on . . . business exigencies . . .  
20 and [to] exercise business judgment to resolve any business decisions where the venturers could  
21 not agree.”).

22 These provisions, read together, permit a bankruptcy court to use its discretion to appoint  
23 a responsible officer where needed to assure the integrity of the bankruptcy process. For  
24 example, the United States Bankruptcy Court for the Northern District of Texas (Hon. D.  
25 Michael Lynn) recently appointed a chief restructuring officer after an involuntary petition was  
26 filed against the parent of Texas Rangers Baseball Partners (“TRBP”), the owner of the Texas  
27 Rangers baseball team. There, TRBP filed a voluntary petition to confirm a plan of  
28 reorganization that would sell the Texas Rangers baseball team to a third party without an



1 auction. The parent was required to consent to the plan of reorganization in order for the plan to  
 2 be confirmed. The lenders of TRBP (which also held limited guaranties from the parent)  
 3 objected to the sale and filed an involuntary petition against the parent. Prior to the entry of any  
 4 order for relief, the court determined that the existing management of the parent had a conflict of  
 5 interest in connection with the proposed sale and appointed a chief restructuring officer as a  
 6 neutral third party for the limited purpose of exercising the parent's right to consent to the plan.  
 7 *In re Texas Rangers Baseball Partners*, 435 B.R. 706, 709 n. 3 (Bankr. N.D. Tex. 2010). The  
 8 court reasoned that the appointment of a neutral third party would ensure the integrity of the sale  
 9 and bankruptcy process. Importantly, the court made it clear that the chief restructuring officer  
 10 had no authority over baseball operations. Its sole purpose was to assure that the sale process  
 11 was fair. Judge Lynn has also recently noted in an article that "[p]arties have devised, with the  
 12 acquiescence of the courts . . . neutrals to give stakeholders in a case confidence in the integrity  
 13 of the bankruptcy process." Judge D. Michael Lynn, *The Toolbox: Trustees & Examiners*, 4  
 14 Bloomberg Law Reports: Bankruptcy Law No. 40, Oct. 4, 2010, at 1.

15 This is exactly the type of case where a neutral third party is warranted for the limited  
 16 purpose of choosing counsel for South Edge in connection with these proceedings and  
 17 determining whether or not to controvert the Petition. The members of South Edge have been  
 18 unable to agree on who should be counsel or what strategy such counsel should pursue. Further,  
 19 the Builders claim to be able to speak for South Edge, but are conflicted. A neutral third party  
 20 will assure that South Edge is properly represented, and will resolve any potential governance  
 21 issues. Importantly, Focus does not propose that the responsible officer interfere with the day-to-  
 22 day operations of South Edge, just that it hire counsel and make an independent decision of what  
 23 is best for South Edge in connection with these proceedings.<sup>7</sup>

24 **1. The Builders Are Hopelessly Conflicted And Cannot Meaningfully Represent**  
 25 **South Edge's Interests**  
 26

27 <sup>7</sup> Focus is aware that the Petitioners have requested an interim trustee, and is not taking a position on that request at  
 28 this time. The point of this Motion is merely that South Edge must retain counsel and decide whether or not to  
 contravene the Petition, and that a neutral third party is best to accomplish that role.

1 The Builders have serious conflicts of interest and simply cannot act for South Edge in  
 2 connection with the Petition. As the Award made clear, the Builders improperly stopped  
 3 development of the Project, failed to provide South Edge with their pro rata share of the capital  
 4 required for South Edge to fund the payments it owed to the Lenders, and failed to make their  
 5 takedowns when due. DeVore Decl., Ex. D (Award), p. 58. As a result, the Builders owe South  
 6 Edge hundreds of millions of dollars. The Panel, however, found that Focus lacked standing to  
 7 hold the Builders accountable on behalf of South Edge. *Id.* at 48. A chapter 11 proceeding could  
 8 provide South Edge with the tools needed to enforce its rights under the Operating Agreement.  
 9 This creates a serious and untenable conflict for the Builders. The Builders simply have no  
 10 interest in enabling South Edge to pursue claims against them, let alone to fund such a result. A  
 11 responsible officer would have none of these conflicts, and could make a reasoned decision  
 12 regarding how South Edge should proceed in this matter.

13 In addition, under the terms of the Repayment Guaranties, if this proceeding is not  
 14 dismissed within 60 days, the Builders will owe direct and substantial obligations to the Lenders.  
 15 This threat also makes it impossible for the Builders to put the interests of South Edge first.

16 Finally, South Edge has been alleged to be insolvent. If this is, in fact, the case, the  
 17 Builders, as purportedly controlling Members of South Edge, may have fiduciary duties that they  
 18 simply cannot satisfy in light of their conflicts and self-interests. Indeed, in July 2009, the  
 19 District Court noted in the UCC Actions that “the [District] Court concludes the Nevada Supreme  
 20 Court would extend the insolvency exception [to the general rule that the lender-borrower  
 21 relationship is not fiduciary] to limited liability companies.” *JPMorgan Chase Bank, N.A. v. KB*  
 22 *Home et al.*, 632 F. Supp. 2d 1013, 1026-27 (D. Nev. 2009) (Pro, J.). In light of these potential  
 23 duties, a neutral party is critical to assuring that the rights of all parties in interest are protected  
 24 and that South Edge makes appropriate decisions in connection with this proceeding.

## 25 **2. A Responsible Officer is Necessary to Break Deadlock Among South Edge’s** 26 **Members**

27 The arbitration directly resulted from acrimony between Focus and the Builders after two  
 28 years of unproductive Management Committee meetings in which Focus remained at loggerheads

1 with the Builders over the very events that directly led to this proceeding. Further, a  
 2 supermajority is needed for South Edge to retain counsel in connection with these proceedings,  
 3 and the parties are unable to agree on whom that counsel should be or what positions it should  
 4 take. Under these circumstances, a responsible officer is appropriate. Indeed, where a debtor's  
 5 management suffers from such deadlock, bankruptcy courts regularly appoint chapter 11 trustees,  
 6 a more significant appointment than a responsible officer.

7 For example, in *In re New Towne Development, LLC*, 404 B.R. 140 (Bankr. M.D. La.  
 8 2009), the debtor, New Towne Development Group, ("New Towne") was a limited liability  
 9 company formed in 2006. *Id.* at 143. As with South Edge, New Towne's members signed an  
 10 operating agreement "contemplating the acquisition and development of real property." *Id.* In  
 11 April 2008, some of New Towne's members voted to terminate the tenure of one member's  
 12 representative as chair of the board of managers and project developer. The representative  
 13 retained voting rights for his member company, though, and thereafter was the only member to  
 14 vote against a capital call for a required interest payment due to a lending bank. *Id.* at 144. When  
 15 New Towne failed to make the payment, the bank served a demand. Two members subsequently  
 16 formed a new limited liability company, "Old Towne," bought the bank's note, and sued to  
 17 foreclose on its mortgage. *Id.* at 145. The day before the sheriff's sale, certain of New Towne's  
 18 members, on an individual basis, filed an involuntary petition to place New Towne into  
 19 bankruptcy. *Id.* Thereafter, both Old Towne and the petitioning creditors moved for the  
 20 appointment of a chapter 11 trustee. The Bankruptcy Court held:

21 The evidence supports a finding and conclusion that cause exists to  
 22 appoint a chapter 11 trustee. The [] membership dispute effectively  
 23 has paralyzed New Towne's management, and necessitates  
 installing a neutral third party to operate the debtor unhampered by  
 its members' disagreements.

24 *Id.* at 149. Here, the South Edge Management Committee suffers from a more pressing  
 25 paralysis. It cannot secure counsel and determine the proper course of action in connection with  
 26 this proceeding without a responsible officer.

27 Analogously, other courts have held that "grounds for the appointment of a trustee may  
 28 exist if a corporate deadlock of the debtor's governing body prevents debtor from receiving the

1 necessary corporate approval to present a plan of reorganization to the court.” *In re New Orleans*  
 2 *Paddlewheels, Inc.*, 350 B.R. 667, 681 (Bankr. E.D. La. 2006) (citing *In re Petrallex Stainless,*  
 3 *Ltd.*, 78 B.R. 738 (Bankr. E.D. Pa. 1987); *In re Advanced Electronics, Inc.*, 99 B.R. 249 (Bankr.  
 4 M.D. Pa. 1989); *In the Matter of Tahkenitch Tree Farm P’ship*, 156 B.R. 525 (Bankr. E. D. La.  
 5 1993). Moreover, while there is no “per se rule,” bankruptcy courts may appoint a neutral trustee  
 6 where such acrimony exists between debtor and creditor that the situation becomes a “large and  
 7 messy bankruptcy that promises to get worse without a disinterested administrator at the helm.”  
 8 *In re Marvel Entertainment Group, Inc.*, 140 F.3d 463, 474 (3d Cir. 1998) (citing *In re Cajun*  
 9 *Elec. Power Coop., Inc.*, 73 F.3d 599, 600 (5th Cir. 1996) (adopting on rehearing the opinion of  
 10 dissent in 69 F.3d at 751), *cert denied*, 116 S.Ct. 51, 136 L.E.2d 15 (1996)); *see also In re*  
 11 *Colorado-Ute Elec. Ass’n, Inc.*, 120 B.R. 164, 176 (Bankr. D. Colo. 1990) (appointing trustee  
 12 where the court could not “envision a way for the current management and board to resolve the  
 13 inherent conflict between what is best for [the Debtor], its creditors, and the co-op members.”).

14 The Members of South Edge have been so far unable to resolve their acrimony, which has  
 15 in turn led to managerial deadlock. A responsible officer can break this deadlock and allow South  
 16 Edge to proceed meaningfully, under neutral stewardship, through the chapter 11 restructuring  
 17 process.

## 18 V.

## 19 CONCLUSION

20 For all the foregoing reasons, Focus and Holdings Manager respectfully requests that this  
 21 Court order the relief set forth above on an emergency basis and any other relief that may be just  
 22 and proper under the circumstances.

1 Dated: December 22, 2010

2 Respectfully submitted,

3 By: /s/ I. Scott Bogatz

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